JOANNE M. MASSIRIO
v.
WESTERN HILLS MINING ASSOCIATION ET AL.

IBLA 83-98 Decided December 29, 1983

Appeal from decision of Administrative Law Judge L. K. Luoma declaring invalid for lack of discovery and for being nonmineral in character that part of a placer mining claim located upon lands which were patented with a reservation of minerals under the Stock-Raising Homestead Act of 1916.

Affirmed as modified.

1. Mining Claims: Contests -- Rules of Practice: Private Contests -- Stock-Raising Homesteads

   Patentees under the Stock-Raising Homestead Act of 1916 have an adverse interest sufficient to bring a private contest against allegedly invalid mining claims located for minerals reserved to the United States, which claims threaten to destroy the value of the surface of their patented lands.

2. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

   Deposits of common varieties of stone were withdrawn from location by sec. 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1976). The locator of a claim for stone after that date must establish that the mineral deposit has a unique property giving it a distinct and special value reflected in a higher market price or reduced cost of production.

3. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Placer Claims

   Where the evidence in a private contest of that part of a placer mining claim embraced in land patented under the Stockraising Homestead Act establishes that the 10-acre subdivisions therein are nonmineral in character, the claim is properly declared null and void as to such land.

APPEARANCES: Clyde R. A'Neals and Rexford C. Starling, San Diego, California, for contestees, Western Hills Mining Association, et al.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Western Hills Mining Association and others 1/ have appealed from a decision of Administrative Law Judge L. K. Luoma, dated October 6, 1982, declaring invalid the Western Placer No. 1 mining claim, to the extent that it embraced land patented with a mineral reservation to contestant's predecessor in title.

This proceeding arose in response to a contest complaint filed by Joanne M. Massirio, the present owner of the land which was patented pursuant to the Stock-Raising Homestead Act of December 29, 1916, ch. 9, § 1, 39 Stat. 862. 2/ The complaint alleged that the contestees had failed to discover valuable mineral deposits within the limits of contestant's land in conflict with the mining claim and further that the subject property does not contain any deposits of valuable minerals within the meaning of the mining law. The contestant further asserted that:

> Contestees have conducted and threaten to continue to conduct road building, the clearance of the natural vegetation from the land, and the removal of materials from the land. Contestees have conducted such activities despite the fact that they have failed to comply with the requirements of Section 9 of the Act of December 29, 1916 (43 U.S.C. 299), in that contestees have failed to either (i) obtain contestant's consent, (ii) enter into an agreement with the contestant for the payment of damages to tangible improvements or crops, or (iii) execute a good and sufficient undertaking to the United States for the use and benefit of contestant for any damages to her crops or tangible improvements as a result of such mining activities.

The mining claimants filed timely answers denying the allegations. A hearing on the complaint was held on January 14, 1982, in San Diego, California.

On appeal from the Administrative Law Judge's decision, appellants (contestees) allege that contestant was without legal right to contest the mining claim. Further, appellants contend that the mineral material found on the claim is an uncommon stone valuable in the manufacture of clay for ceramic applications.

Patents issued under the Stock-Raising Homestead Act were required by statute to contain a "reservation to the United States of all minerals in said lands and the right to prospect for, mine, and remove the same." Act of

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1/ The contestees below and appellants before the Board are the Western Hills Mining Association, the Settlors Corporation; the Shenma Corporation; Thomas W. Buckel; Rexford C. Starling; Clyde R. A'Neals; Howard Gunn; and Charles Sam Hansen.

2/ Repealed by Federal Land Policy and Management Act of 1976, P.L. 94-579, § 702, 90 Stat. 2743, 2787.

December 29, 1916, ch. 9, § 1, 39 Stat. 862. Section 9 of the Act further defined the reserved mineral rights, providing that a mining claimant

> shall have the right at all times to enter upon the lands * * * patented * * * for the purpose of prospecting for * * * mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the * * * patentee, and shall be liable to and shall compensate the * * * patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the * * * mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining or removal of the * * * minerals, first, upon securing the written consent or waiver of the homestead * * * patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the * * * owner of the land, to secure the payment of such damages to the crops or tangible improvements of the * * * owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon * * *.

Act of December 29, 1916, ch. 9, § 9, 39 Stat. 864, 43 U.S.C. § 299 (1976).

The placer mining claim which is the subject of this contest was located by the contestees for stone on December 20, 1980.

[1] The initial question presented is whether the contestant who has title to the surface, but not to the mineral estate, has standing to contest the validity of the mining claim under the Departmental regulation at 43 CFR 4.450-1 which provides:

> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land * * * may initiate proceedings to have the claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

It is well established that the stock-raising homestead patentee (or his successor in interest), as holder of title to the land except for the reserved minerals, has standing to challenge the validity of a mining claim on the patented land for lack of discovery of a valuable mineral deposit by initiation of a private contest pursuant to 43 CFR 4.450. Sedgwick v. Callahan, 9 IBLA 216 (1973), quoted in Thomas v. Morton, 408 F. Supp. 1361 (D. Ariz. 1976), aff'd. sub nom. Thomas v. Andrus, 552 F.2d 871 (9th Cir. 1977); accord, Elmer Silvera, 42 IBLA 11 (1979). Therefore, we must affirm the decision of the Administrative Law Judge that contestant had standing to bring this private contest.

No basis has been established in the record to support appellants' contention that contestant was not the owner of the property upon which she based her standing to contest. Contestees attached to their answer to the contest complaint a copy of a deed for the N 1/2 SW 1/4 NE 1/4 of sec. 33, T. 14 N., R 1 E., San Bernardino meridian, to contestant's predecessor in interest. The deed, by its terms, purports to reserve mineral rights in the tract and the right to surface mine a portion of the tract. Contestant's exhibit 7 introduced at the hearing consisted in part of the deed by which she obtained title which included similar reservations. However, such a reservation of minerals or the right to mine them by any predecessor in title other than the United States was nugatory as such rights were reserved under the Stock-Raising Homestead Act patent from the United States (Exh. 7). Establishment of a claim to locatable minerals required location of a mining claim under Federal mining law as noted in section 9 of the Stock-Raising Homestead Act quoted previously. The claim which is the subject of the contest was located pursuant to the mining law on December 20, 1980.

It is well established that a valid mineral discovery only occurs: "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine." Castle v. Womble, 19 L.D. 455, 457 (1894), quoted in United States v. Coleman, 390 U.S. 599 (1968).

This prudent man test has been complemented by the "marketability test," that is, a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, supra; Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969).

[2] Section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1976), withdrew from the operation of the mining laws, including the Building Stone Act of August 4, 1892, 30 U.S.C. § 161 (1976), any "deposit of common varieties of * * * stone." See United States v. Coleman, supra at 604-05. The same section provides that a deposit having a unique property giving it distinct and special value is not a common variety. The standards by which to distinguish between common varieties and uncommon varieties of material were set forth in McClarty v. Secretary of the Interior, 408 F.2d 907, 908-09 (9th Cir. 1969). They are:

1. There must be a comparison of the mineral deposit in question with other deposits of such minerals generally;

2. The mineral deposit in question must have a unique property;

3. The unique property must give the deposit a distinct and special value;

4. If the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use;

> 5. The distinct and special value must be reflected by the higher price which the material commands in the market place, or by reduced cost or overhead so that the profit to the claimant would be substantially more.

The evidence adduced at the hearing regarding the mineral deposits on appellants' claim was summarized by the Administrative Law Judge as follows:

> Contestant presented the testimony of Mr. Gordon Gastil, a professor of geology at San Diego State University for the last 21 years. He is a registered geologist in the State of California and has done geological mapping over most of the southwestern San Diego County, which includes the area of the claim.
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> Professor Gastil made an examination of that portion of the claim which lies within contestant's property for the purpose of seeing whether there were locatable minerals on the property. He examined all places where excavation and surface clearing had been done. He described the geology as being scattered outcrops of granodiorite with decomposed equivalent material in between. He said there are small dikes of aplite which weather out in blocks scattered over the soil surface. The aplite dikes have no special or unique characteristics and are very common, ordinary rocks which appear throughout the San Diego County and adjacent areas. He said such rock is not suitable for crushing and is not used by anyone for commercial purposes. He stated further that he found no material or stone which he would consider suitable as building stone in a constructional or decorative sense, nor any dimensional stone which could be quarried as such. He concluded that there was nothing on the property of remotely economic significance which would qualify as locatable as either a placer or lode claim.
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> Another witness, Mr. A. C. McEleree, employed by the Woodward Sand Company which produces concrete, masonry and plaster, testified that he examined the claim and found nothing which would be suitable for use in the sand and gravel business.
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> Mr. Warren Holden, a building materials salesman for the Hazard Products Company, which carries an extensive inventory of building stone used in industry in the San Diego area, testified that he examined the aplite dike material from the claim and concluded that it is wide spread throughout the San Diego area and has little value in the building stone market.

Gastil acknowledged that the aplite contains potassium feldspar, but he testified that the aplite has no value either for building stone or as a source of clay for ceramics (Tr. 26-29).

Contestees' witness Richard Lambert, who is engaged in manufacturing clay for use in the ceramics industry, noted that the samples from the claim introduced at the hearing appeared to have some feldspar in them. He opined that they could be crushed for feldspar (Tr. 97). However, on cross-examination he conceded that he has no knowledge of the production of feldspar

from rock form as he manufactures clay from raw material which has already been reduced to powder form by his supplier (Tr. 98-99). He further testified that he had never been to appellants' claim (Tr. 100), and that he did not know whether samples supplied to him by contestees for ceramics tests came from the contested claims (Tr. 100-01). Indeed, according to the testimony, the samples came from a total of seven or eight different claims (Tr. 100-01).

When Government contest proceedings are brought against a mining claim, contestant has the burden of establishing a prima facie case that no discovery of a valuable mineral deposit has been made. When such a prima facie case is established by contestant, the burden then is upon the mineral claimant to show by a preponderance of the evidence that a discovery has been made within the limits of the claim. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). However, as a general rule, in a private contest the burden of proof is on the contestant to establish the invalidity of the contested claim by a preponderance of the evidence. In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 22 n.4, 90 I.D. 352, ; State of California v. Doria Mining & Engineering Corp., 17 IBLA 380, 389 (1974); Marvel Mining Co. v. Sinclair Oil & Gas Co., 75 I.D. 407, 423 (1968). We find some justification for the distinction in that when the Department contests a claim it is exercising its statutory responsibility to adjudicate the validity of a claim to the public lands. A private contestant, on the other hand, is asserting the primacy of a conflicting private claim to the public lands requiring invalidation of contestee's claim. Thus the private contestant may properly be regarded as the proponent of the rule, i.e., the invalidity of the contested claim.

[3] The contest complaint itself, as well as the testimony of contestant's expert witnesses, regarding the existence or nonexistence of a discovery of a valuable mineral deposit was limited to the lands within the boundaries of contestant's property. 3/ However, the presence of a discovery anywhere within the boundaries of an association placer claim is sufficient to support the validity of the entire claim provided the evidence establishes that each 10-acre subdivision thereof is mineral in character. See United States v. Bunkowski, 5 IBLA 102, 127, 79 I.D. 43, 54-55 (1972); United States v. Williamson, 75 I.D. 338, 343 (1968). Thus, the lack of evidence of a discovery on contestant's land is not dispositive.

However, the evidence required to establish that the land is mineral in character, i.e., to establish a reasonable belief that the land contains locatable minerals of such quality and in sufficient quantity as to render its extraction profitable and justify expenditures to that end is very similar to the evidence required to establish a discovery. United States v. Williamson, supra at 344. We find that the record establishes, based on a preponderance of the evidence, that the minerals found on the contested portion of the claim are a common variety of stone subject to the provisions of

3/ In a mining contest, a matter not charged in the complaint cannot be used as a ground to find the claim invalid unless it has been raised at the hearing without objection by the contestee. United States v. McElwaine, 26 IBLA 20, 26-27 (1976).

the Act of July 23, 1955, and were withdrawn as of that date from location under the general mining laws. Further, the evidence establishes that the 20 acres of the mining claim under contest -- the land to which contestant holds title to the surface estate -- is nonmineral in character. Accordingly, appellants' claim is properly found to be null and void as to such land.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge